Yap Boon Thai v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO K-05–156 OF 2011
AZAHAR MOHAMED, LINTON ALBERT AND ZAWAWI SALLEH JJCA
25 JUNE 2013

Criminal Procedure — Appeal — Conviction and sentence, against — Whether trial judge erred in failing to take into consideration unidentified DNA found at scene — Whether presence of unidentified DNA consistent with appellant's defence — Whether appellant prejudiced by trial judge's failure to send fingerprints recovered from scene for analysis — Whether prosecution had established intention to cause death — Whether prosecution's failure to establish motive fatal — Whether trial judge rightly convicted appellant

Evidence — Circumstantial evidence — No direct evidence — Whether there was sufficient, reliable circumstantial evidence that appellant had committed crime — Information leading to fact discovered — Admissibility — Whether evidence amounted to inadmissible confession — Conduct — Whether trial judge misdirected himself by admitting evidence of appellant's conduct that led to discovery of items that belonged to deceased — Whether appellant's lies to prosecution witnesses amounted to corroboration of appellant's attempt to conceal guilt — Evidence Act 1950 s 8

Ismianti, an Indonesian citizen, ('the deceased') was employed as a cleaner in a homestay located in Sungai Petani. On 8 June 2005, she failed to report for her cleaning duties, and was later found dead by a co-worker in room 988 of the homestay. The pathologist who performed the autopsy on the deceased's body found 69 stab wounds and incised wounds on the deceased's body. According to the pathologist the stab wounds and incised wounds were caused by a thin and sharp weapon such as the knife found at the scene of the crime. The pathologist also confirmed that the cause of death was the stab wound found behind the deceased's right ear, which was fatal in nature. The appellant, a contract worker, who had been staying at the homestay while working in the nearby Sungai Petani Hospital between the months of April to June 2005 was arrested and charged with the murder of the deceased. According to the prosecution evidence, blood swabs that were taken for DNA profiling from inside room 988, confirmed the presence of the appellant's DNA profile in the room. The appellant also led the police to several places around Sungai Petani and Kuala Lumpur, where a bunch of keys belonging to the homestay was recovered and a handphone belonging to the deceased was seized. These events,

which led to the discovery of the said items, were reduced into a police report ('exh P103') and tendered in evidence. A second handphone belonging to the deceased was seized from a handphone store. The proprietor of the handphone store ('SP11') testified that the appellant had sold the handphone to him for RM60 after informing the former that he needed the cash after being involved in an accident. In addition, the appellant had sought medical treatment from a clinic in Sungai Petani for an incised wound and laceration on his right small finger and middle finger. The doctor who attended to the appellant at the clinic ('SP9') testified that the appellant claimed to have suffered the injuries from a fall from his motorcycle. In his defence the appellant gave evidence on oath that an unknown man had assaulted and stabbed the deceased. The appellant testified that when he rushed to the deceased's aid he had been attacked by the man and suffered the injuries he had sustained. He further claimed that he fled the scene because he was afraid that he would be implicated with the murder. The trial judge convicted the appellant of the murder and sentenced him to death. This was the appellant's appeal against that conviction and sentence on the grounds that the trial judge, had erred in failing to take into consideration the unidentified DNA found at the scene, which was consistent with his defence that an unknown man had caused the death of the deceased; had prejudiced the appellant by his failure to send the 8 fingerprint impressions recovered from room 988 for expert analysis; and had misdirected himself when he admitted exhibit 103, which amounted to an inadmissible confession.

Held, dismissing the appeal:

(1) The trial judge had specifically addressed the issue of the unidentified DNA profile found at the scene and there was no reason to disturb the finding on this issue. A close scrutiny of the evidence showed that the blood stain was found on the floor outside room 988, a separate area (see paras 29–30).

(2) In the instant case, the prosecution's case rested substantially or entirely on circumstantial evidence. It is settled law that in the absence of direct evidence, the prosecution could resort to adducing circumstantial evidence to discharge its burden. Applying the principles of law to the present case there was sufficient, reliable and clinching circumstantial evidence, which led to the inescapable conclusion that the appellant had committed the crime charged. The presence of the appellant's DNA profile in room 988; the evidence of the stolen room keys and the deceased's handphones and the appellant's attempts to dispose and/or sell the stolen items taken together with the appellant's subsequent conduct of leading the police to the discovery of those same items; as well as the appellant's conduct of lying to SP9 and SP11 about meeting with a motorcycle accident, were all circumstances that connected the appellant to the crime (see paras 31–34).

(3) Intention or mens rea was not something capable of being established by direct evidence. It was a matter of inference that could be gathered from all the facts and circumstances prevailing in the case. In the instant case, the prosecution had established intention to cause death via the evidence by the pathologist. In view of the medical evidence by the pathologist and the use of the dangerous weapon, the present case would fall squarely within s 300(c) of the Penal Code. Thus, there was no reason to disturb the trial judge's finding that the appellant, who had inflicted the injuries, had intended to kill the deceased (see paras 35–37).

(4) The appellant's contention that he was prejudiced by the trial judge's failure to send the fingerprint impressions retrieved from the scene for analysis was not acceptable. The prosecution had clearly established that the appellant had committed the offence with the requisite mens rea. Thus, the lack of fingerprint evidence would have little or no significance to the prosecution's case. In any case, the appellant's conduct in stealing the deceased's handphones and room keys, disposing of those items and pocketing the proceeds from the sale of one of the deceased's handphones greatly affected the probability of the appellant's version of the case. Further, the appellant's lies to SP9 and SP11 amounted to corroboration of the appellant's attempt to conceal guilt (see paras 38–40).

(5) The appellant's submission that the trial judge had misdirected himself when he admitted the contents of exhibit P103 was misconceived. The trial judge had addressed his mind to the fact that P103 amounted to an inadmissible confession. At the same time the trial judge had not erred when he admitted the evidence of the appellant's conduct, which led to discoveries of the various exhibits, as admissible under s 8 of the Evidence Act 1950 (see paras 43–45).

(6) The failure of the prosecution to establish the motive of the appellant to murder the deceased was not fatal. In the instant case, the clinching incriminating circumstances established by the prosecution would unerringly point to the guilt of the appellant alone. Thus, the trial judge had rightly convicted the appellant under s 302 of the Penal Code (see paras 47–49).

[Bahasa Malaysia summary

Ismianti, seorang warganegara Indonesia ('si mati') diambil berkerja sebagai seorang tukang bersih di sebuah *homestay* yang terletak di Sungai Petani. Pada 8 Jun 2005, dia gagal melapor diri bagi tugas-tugas membersih dan kemudiannya dijumpai mati oleh teman sekerjanya di bilik 988 di *homestay* tersebut. Ahli patologi yang menjalankan autopsi ke atas badan si mati mendapati 69 luka tikaman dan luka-luka kelaran pada badan si mati. Menurut ahli patologi tersebut, luka-luka tikaman dan luka-luka kelaran disebabkan oleh satu senjata yang nipis dan tajam seperti pisau yang dijumpai

di tempat kejadian. Ahli patologi juga mengesahkan bahawa sebab kematian adalah luka tikaman yang didapati pada belakang telinga kanan si mati, yang pada sifatnya boleh membawa kepada kematian. Perayu, seorang pekerja kontrak, yang telah tinggal di *homestay* tersebut ketika berkerja berdekatan Hospital Sungai Petani antara bulan April hingga Jun 2005 ditahan dan didakwa atas pembunuhan si mati. Menurut keterangan pendakwaan, darah yang diambil bagi pemprofilan DNA daripada dalam bilik 988, mengesahkan adanya profil DNA perayu dalam bilik tersebut. Perayu juga membawa polis ke beberapa tempat sekitar Sungai Petani dan Kuala Lumpur, di mana segugus kunci milik *homestay* tersebut dijumpai dan telefon bimbit milik si mati dirampas. Kejadian-kejadian ini, yang membawa kepada penemuan barang-barang tersebut dimasukkan dalam laporan polis ('eksh P103') dan dikemukakan sebagai keterangan. Telefon bimbit kedua milik si mati dirampas dari sebuah kedai telefon bimbit. Pemilik kedai telefon bimbit tersebut ('SP11') memberi keterangan bahawa perayu telah menjual telefon bimbit tersebut kepadanya dengan harga RM60 selepas memaklumkan kepadanya bahawa dia memerlukan wang selepas terlibat dalam suatu kemalangan. Tambahan lagi, perayu telah mendapatkan rawatan perubatan di sebuah klinik di Sungai Petani bagi luka kelaran dan pelecetan pada jari kelingking dan jari tengah pada tangan kanannya. Doktor yang merawat perayu di klinik ('SP9') memberi keterangan bahawa perayu mendakwa telah mengalami kecederaan tersebut akibat jatuh daripada motosikalnya. Dalam pembelaannya, perayu memberikan keterangan bersumpah bahawa seorang lelaki yang tidak dikenali telah menyerang dan menikam si mati. Perayu memberi keterangan bahawa apabila dia segera membantu si mati, dia telah diserang oleh lelaki tersebut dan mengalami kecederaan-kecederaan yang dialaminya. Dia seterusnya mendakwa bahawa dia melarikan diri kerana takut dia akan dipersalahkan bagi pembunuhan tersebut. Hakim bicara mensabitkan perayu atas pembunuhan tersebut dan menjatuhkan hukuman mati ke atasnya. Ini adalah rayuan perayu terhadap sabitan dan hukuman tersebut atas alasan bahawa hakim bicara, gagal mempertimbangkan DNA yang tidak dikenali yang dijumpai di tempat kejadian, yang mana konsisten dengan pembelaan perayu bahawa seorang lelaki yang tidak dikenali telah menyebabkan kematian si mati; telah memprejudiskan perayu dengan kegagalannya untuk menghantar lapan kesan cap jari yang diperolehi dari bilik 988 untuk analisa pakar; dan telah tersalah arah apabila beliau menerima eksh 103, yang merupakan kepada pengakuan yang tidak boleh diterima.

Diputuskan, menolak rayuan:

(1) Hakim bicara telah secara khususnya menangani isu profil DNA yang tidak dikenali yang dijumpai di tempat kejadian dan tiada alasan untuk campur tangan dalam dapatan isu ini. Suatu penelitian pada keterangan menunjukkan bahawa kesan darah dijumpai atas lantai di luar bilik 988, suatu kawasan yang berasingan (lihat perenggan 29–30).

(2) Dalam kes ini, sebahagian besar atau keseluruhan kes pendakwaan bersandarkan pada keterangan ikut keadaan. Adalah undang-undang matan bahawa dengan ketiadaan keterangan langsung, pendakwaan boleh mengemukakan keterangan ikut keadaan untuk melepaskan bebannya. Mengguna pakai prinsip-prinsip undang tersebut kepada kes ini, terdapat keterangan keadaan yang mencukupi, boleh dipercayai dan merangkul, yang membawa kepada kesimpulan yang tidak boleh disangkal bahawa perayu telah melakukan kesalahan yang didakwa. Wujudnya profil DNA dalam bilik 988; keterangan kecurian kunci-kunci bilik dan telefon-telefon bimbit si mati dan percubaan-percubaan perayu untuk membuang dan/atau menjual barang-barang yang dicuri bersama-sama dengan perlakuan kemudian perayu yang membawa kepada polis menjumpai barang-barang tersebut; juga perlakuan perayu yang menipu SP9 dan SP11 mengenai kemalangan motosikal, adalah hal-hal keadaan yang mengaitkan perayu dengan kesalahan (lihat perenggan 31–34).

(3) Niat atau mens rea bukanlah sesuatu yang boleh dibuktikan dengan keterangan langsung. Ia adalah hal perkara inferens yang boleh dibuat berdasarkan fakta-fakta dan hal-hal keadaan yang wujud dalam kes tersebut. Dalam kes ini, pihak pendakwaan telah membuktikan niat untuk menyebabkan kematian melalui keterangan ahli patologi. Melihat pada keterangan perubatan oleh ahli patologi dan penggunaan senjata berbahaya, kes ini terangkum di bawah s 300(c) Kanun Keseksaan. Oleh itu, tiada sebab untuk campur tangan dalam dapatan hakim bicara bahawa perayu, yang telah menyebabkan kecederaan, telah berniat untuk membunuh si mati (lihat perenggan 35–37).

(4) Hujahan perayu bahawa dia telah diprejudis oleh kegagalan hakim bicara untuk menghantar kesan cap jari yang diperolehi daripada tempat kejadian bagi analisa tidak boleh diterima. Pihak pendakwaan telah dengan jelas membuktikan bahawa perayu telah melakukan kesalahan tersebut dengan mens rea yang diperlukan. Oleh itu, ketiadaan keterangan cap jari mempunyai sedikit atau tiada kepentingan kepada kes pendakwaan. Dalam kes ini, tindakan perayu mencuri telefon-telefon bimbit si mati dan kunci-kunci bilik, melupuskan barang-barang tersebut dan menyimpan hasil jualan salah satu telefon bimbit si mati memberi kesan besar kepada kemungkinan versi perayu mengenai kes. Selanjutnya, penipuan perayu kepada SP9 dan SP11 terjumlah kepada sokongan percubaan perayu untuk menyembunyikan kebersalahan (lihat perenggan 38–40).

(5) Hujahan perayu bahawa hakim bicara tersalah arah dirinya dalam menerima kandungan eksh P103 adalah satu salah tanggapan. Hakim bicara telah mengarahkan minda beliau kepada fakta bahawa P103 terjumlah kepada pengakuan yang tidak boleh diterima. Pada masa yang

A sama, hakim bicara tidak terkhilaf apabila beliau menerima keterangan mengenai perlakuan perayu, yang membawa kepada penemuan-penemuan pelbagai ekshibit, sebagai boleh diterima di bawah s 8 Akta Keterangan1950 (lihat perenggan 43–45).

B (6) Kegagalan pihak pendakwaan untuk membuktikan motif perayu bagi pembunuhan si mati tidak menjejaskan. Dalam kes ini, hal keadaan pertalian yang menunjukkan seseorang itu bersalah yang dibuktikan oleh pihak pendakwaan dengan tepat akan dengan sendiri menunjukkan kebersalahan perayu. Oleh itu, hakim bicara telah dengan betul mensabitkan perayu di bawah s 302 Kanun Keseksaan (lihat perenggan 47–49).]

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Notes

For cases on conviction and sentence against, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 324–370.

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Cases referred to

Bala anak Matik v Public Prosecutor [2006] 3 MLJ 516; [2006] 2 CLJ 229, CA (refd)

E *Chan Chwen Kong v PP* [1962] 1 MLJ 307; [1962] 1 LNS 22, CA (refd)

Dato' Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] 2 CLJ 10, FC (refd)

Kamrul Hasan Abdul Quddus v PP [2011] SGCA 52, CA (refd)

Magendran a/l Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)

F *Mazlan bin Osman v PP* [2012] 9 MLJ 703; [2013] 1 AMR 615, HC (refd)

Mulakh Raj etc v Satish Kumar and Others, AIR 1992 SC 1175, SC (refd)

Nachhittar Singh v The State of Punjab AIR 1975 SC 118, SC (refd)

Prakash Chand v State AIR 1979 400 (refd)

G *PP v Hanif Basree bin Abdul Rahman* [2007] 2 MLJ 320; [2007] 2 CLJ 33, CA (refd)

PP v Letchumanan a/l Krishnan [2008] 3 MLJ 290; [2007] 1 LNS 409, HC (refd)

Regina v Lucas (Ruth) [1981] QB 720, CA (refd)

H *Sainal Abidin bin Mading v PP* [1994] 4 MLJ 497, CA (refd)

Syed Ali bin Syed Abdul Hamid & Anor v PP [1982] 1 MLJ 132, FC (refd)

Tham Kai Yau & Ors v PP [1977] 1 MLJ 174, FC (refd)

Virsa Singh v State Punjab AIR 1958 SC 465, SC (refd)

Wakkar and Anor v State of Uttar Pradesh [2011] 3 SCC 306, SC (refd)

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Legislation referred to

Criminal Procedure Code s 103
Evidence Act 1950 s 8
Penal Code ss 300(c), 302

Appeal from: Criminal Trial No 45–41 of 2009 (High Court, Alor Setar)

Dev Kumarendran (Kumar & Co) for the appellant.
Kwan Li Sa (Deputy Publis Prosecutor, Attorney General's Chambers) for the respondent.

Zawawi Salleh JCA (delivering judgment of the court):

THE ANTECEDENTS

[1] This appeal stems from the judgment of the Alor Setar High Court dated 16 May 2011, convicting the appellant on one count of the offence of murder under s 302 of the Penal Code and sentencing him to death.

[2] The charge proffered against the appellant reads as follows:

> Bahawa kamu pada 7.6.2005, jam antara lebih kurang 7.45 malam hingga 8.40 malam, di dalam bilik No. 988, Rumah Tumpangan SP Relax Hosue, No. B-25, Jalan Sejati 3/1, Taman Sejati Indah, Sungai Petani, di dalam Daerah Kuala Muda, di dalam Negeri Kedah telah melakukan pembunuhan ke atas Ismianti (Pasport No.: AH362485). Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

[3] We have considered the rival submissions made by learned counsel for the parties and perused the appeal records. We do not find any reason to interfere with the decision of the learned trial judge. The appeal was dismissed for lack of merit and the conviction and sentence imposed by the learned trial judge affirmed.

[4] We now give our reasons.

THE PROSECUTION'S VERSION

[5] The version of the prosecution as unfolded during the trial was essentially as follows: Mr Hoe Kok Yen ('SP10') was the proprietor of SP Relax House, 'homestays' located at B-25 and B-26, Jalan Sejati 3/1, Taman Sejati Indah, Sungai Petani.

[6] SP10 had employed one Ismianti ('the deceased'), an Indonesian citizen, as a supervisor, whose job includes registering and collecting rentals from guest. The deceased, together with one Paramisswary a/p Kalimuthu ('SP4'), were in-charged for the cleaning and housekeeping of the 'homestays'.

[7] Between April and June 2005, one Wong Chun Liang ('SP14') had a

A contract to install furnitures at the Sungai Petani Hospital. The appellant and two Burmese named 'Uncle' and 'Mo Mo' worked for SP14. SP14 and his workers stayed at SP Relax House.

B **[8]** SP14 and his workers completed their work on 4 June 2005. They then returned to Kuala Lumpur. While at SP14's house in Kuala Lumpur, the appellant requested to borrow some money from SP14 but it was turned down.

[9] The appellant later informed SP14 that he wanted to go back to SP Relax C House to retrieve his bags which he had left there.

[10] On 7 June 2005, at about 8.40pm, the appellant sought medical treatment at Klinik Cinta Sayang, Taman Sejati Indah, Sungai Petani. He was attended by Dr Salek Munhar Abd Latif ('SP11'), who was assisted by one D Rosnita bt Ramli ('SP8'). The appellant told the doctor that he fell down from a motorcycle.

[11] According to SP11, the appellant had sustained a t-shaped incised wound on his right small finger, and laceration on his middle finger. SP11 said E that the injuries were fresh and still bleeding. SP11 opined that that the appellant could sustained the injuries about half-an hour to an hour earlier.

[12] At about 10pm, the appellant went to a handphone store and approached one Abdul Aziz bin Zainol ('SP9') to sell a Nokia 1100 handphone F (exh P10A) at RM60. The appellant informed SP9 he needed cash as he was involved in an accident. Exhibit P10A was later seized and identified by SP10 as belonging to the deceased.

G **[13]** On 8 June 2005, at about 8.40pm, SP4 went about her normal cleaning duties at the rest house. She noticed that the deceased was not around and went to enquire from SP10. SP10 did not know the deceased's whereabout.

[14] SP4 proceeded to clean house No B-25. When she opened room 988, H she found the deceased lying face down on the floor in between two beds, in a pool of blood. SP10 later reported the matter to the authorities.

[15] The appellant was arrested by Kpl Azmi bin Ariffin ('SP1') on 9 June 2005 and he later led the police to several discoveries.

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[16] On 10 June 2005, at about 3.15pm, the appellant led ASP Syed Basri bin Syed Ali ('SP16') to a Caltex Petrol Station at Taman Sejati Indah, Sungai Petani, where a bunch of keys attached to the SP Relax House plate (exh P8) was recovered in a drain.

[17] The appellant also led SP16 to Hentian Bas Puduraya, Kuala Lumpur where a Motorola handphone (exh P11A) was seized from one Ramlan bin Omar ('SP13'). Exhibit P11A was also identified by SP10 as belonging to the deceased.

[18] Forensic police officer, C/Insp Ting Sing Lai ('SP15'), had taken blood swabs from inside Room 988 for DNA profiling. He also found a knife (exh P75) in the room, hidden under the blanket on the bed.

[19] The chemist ('SP19') confirmed the presence of the appellant's DNA profile in the room.

[20] Meanwhile, autopsy on the deceased's body was performed by the pathologist Dr Mohd Suhani bin Mohd Noor ('SP17'). He confirmed that there were 69 injuries (stab wounds and incised wounds) on the deceased's head, body and forearm. The cause of death was 'complete transaction of the right internal carotid artery and partial transaction of the right internal jagular vein due to stab wound to the right retro-auricular region'.

[21] The stab wound found behind the deceased right ear, which cut through her mouth (injury no 23) was fatal in nature. SP17 opined that the stab wounds and incised wounds were caused by a thin and sharp weapon such as exh P75.

THE APPELLANT'S VERSION

[22] The appellant gave evidence on oath. The appellant's version was that on 6 June 2005, he returned to SP Relax House and stayed at Room 988. On 7 June 2005, he left to look for his new employer. At about 8.15pm, he returned to the said room to collect his bags as he did not intend to stay there anymore.

[23] As he came to the said room, he heard a female voice screaming for help. He opened the door and saw a man attempted to stab the deceased. The appellant rushed to the deceased's aid but was attacked by the man; the knife struck his right little finger. The man then fled the scene.

[24] The appellant claimed that he was afraid that he would be implicated with the crime. He cleaned his wound using a towel in the bathroom. The appellant then took his bags, the room keys and the deceased's handphones and left the room.

[25] The appellant threw the keys into a drain and went to Klinik Cinta

A Sayang to seek medical treatment. He lied to the doctor that the injury was caused by an accident. He then took a bus back to Kuala Lumpur.

THE APPEAL

B **[26]** The conviction and sentence imposed by the High Court were assailed on a number of grounds, but during the course of hearing of this appeal, learned counsel for the appellant has confined his attack largely to the following grounds:

C (a) the circumstantial evidence is not entirely consistent with the guilt of the appellant as an unidentified DNA profile was found at the scene;

(b) the failure to send eight fingerprint impressions recovered from Room 988 for expert analysis had prejudiced the appellant; and

D (c) the learned trial judge had misdirected himself when His Lordship admitted the police report (exh P103) as the contents of the report amounted to a confession.

[27] We now turn to consider each of the issues raised by the appellant.

E

ISSUE (A)

[28] The evidence showed that out of all the human bloodstains taken and analysed, all proved to belong to either the deceased or the appellant, both F blood group B, except a swab marked 'A11'. It was proved to bear blood group A. Learned counsel submitted that the finding was consistent with the defence put forth by the appellant that an unknown man assaulted the deceased. The case of *Public Prosecutor v Hanif Basree bin Abdul Rahman* [2007] 2 MLJ 320; [2007] 2 CLJ 33 was cited in support of this contention.

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[29] We noted that the learned trial judge had specifically addressed this issue at pp 164–166 of the appeal record. After carefully analysed the impugned judgment, and all the available evidence, we find no reason to H disturb the learned trial judge's finding on this issue.

[30] A close scrutiny of the evidence showed that blood stain of blood group A was found on the floor outside Room 988, a separate area. Such being the case, *Hanif Basree*'s case is readily distinguishable. In that case, the DNA of an I 'unknown male 1' was found in the deceased vagina being the minor contributor together with the presence of Hanif's spermatozoa being the major contributor.

[31] In this instant case, the prosecution case rests substantially or entirely on

circumstantial evidence. It is trite that direct evidence of the commission of the offence is not the only matrix where from a trial court may draw its conclusion and finding of the guilt. Conviction can be had on the basis of circumstantial evidence provided that:

(a) the circumstances from which the conclusion of guilt is to be drawn should be fully established;

(b) the facts so established should be consistent with the hypothesis of the guilt of the accused; and

(c) circumstances should be conclusive nature and tendency; there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must shown that in all human probability the act must have been done by the accused.
(See *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805, *Mazlan bin Osman v Public Prosecutor* [2012] 9 MLJ 703; [2013] 1 AMR 615; *Dato' Mohtar Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1980] 2 CLJ 10; *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307; [1962] 1 LNS 22).

[32] In *Public Prosecutor v Letchumanan a/l Krishnan* [2008] 3 MLJ 290; [2007] 1 LNS 409, the court had this to say:

> [22] It is axiomatic under our case-law, and we cite the principle repeatedly, that circumstantial evidence alone may be sufficient to support a conviction for murder since the law makes no distinction between circumstantial evidence and direct evidence and, if circumstantial evidence is used to provide for a conviction; it must be inconsistent with any other hypothesis than that of guilt of the accused (see eg, *Kartar Singh & Anor v R* [1952] 2 MLJ 85; [1952] 1 LNS 43, *Idris v Public Prosecutor* [1960] MLJ 296, *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195; [1965] 1 LNS 171; *Karam Singh v Public Prosecutor* [1967] 2 MLJ 25; [1967] 1 LNS 65, *Chong Kim Seng v Public Prosecutor* [1949] 1 MLJ 109; [1967] 1 LNS 18, *Public Prosecutor v Hanif Basee bin Abdul Rahman* [2007] 2 MLJ 320; [2007] 2 CLJ 33 and *Juraimi bin Jussin v Public Prosecutor* [1998] 1 MLJ 537; [1998] 2 CLJ 383).
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> [23] Where the evidence is wholly circumstantial, what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope the circumstances evidence is such as to fall short of that strand, if it does not satisfy that test, if it leaves gaps, then it is of no use at all (see *Public Prosecutor v Haniff Basree bin Abdul Rahman* per Mohd Ghazali Yusoff JCA).
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> [24] In the cases where a chain of circumstantial evidence has been established by the prosecution, this court in dealing with evidence of this nature always adopts the views stated by of Faizal Ali J in delivering the judgment of the Supreme Court in *Ram Avtar v The State (Delhi Administration)* AIR 1985 SC 1692, which states:

> At the very outset we might mention that circumstantial evidence must be complete and conclusive before an accused can be convicted thereon. This, however, does not mean that there is any particular or special method of proof of circumstantial evidence. We must, however, guard against the danger of not considering circumstantial evidence in its proper perspective, eg, where there is a chain of circumstances linked up with one another, it is not possible for the court to truncate and break the chain of circumstances. In other words where a series of circumstances are dependent on one another they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated. The learned sessions judge seems to have fallen into this very error. In the instant case, instead of taking all the circumstances together, which are undoubtedly circumstantial and closely linked up with one another, the learned sessions judge has completely misdirected himself by separately dealing with each circumstance thereby making a wrong approach while appreciating the circumstantial evidence produced in the case.

[25] The Court of Appeal of Maryland, United States, in *Presley v State* 295 under 143, 159 [1983], penned the well — settled law of circumstantial evidence as follows:

> Circumstantial evidence is not like a chain which falls when its weakest link is broken, but is like a cable. The strength of the cable does not depend upon one strand, but is made up of a union and combination of the strength of all its strands. No one wire in the cable that supports the suspension bridge across Niagara Falls could stand much weight, but when these different strands are all combined together, they support a structure which is capable of sustaining the weight of the heaviest engines and trains. We therefore think it is erroneous to speak of circumstantial evidence as depending on links, for the truth is that in cases of circumstantial evidence each fact relied upon is simply considered as one of the strands and all of the facts relied upon should be treated as a cable.

[33] It must be emphasised that in the absence of direct evidence, the prosecution may resort to adducing circumstantial evidence to discharge its burden. Crimes are usually committed in secret and under condition where concealment is highly probable. If direct evidence is insisted under all circumstances, the prosecution of vicious criminals who committed heinous crimes in secret or secluded places will be hard, if not well nigh impossible.

[34] Applying the principles of law as stated above to the present case, we are of the opinion that there are sufficient, reliable and clinching circumstantial evidence which led to the inescapable conclusion that the appellant committed the crime charged. Indeed, when considered in their totality, the circumstantial evidence points irresistible to the appellant as the culprit. The circumstances which connect the appellant to the crime may be summarised as follows:

(a) the presence of the appellant's DNA profile in Room 988;

(b) the appellant had stolen the room keys, and the deceased's handphones;

(c) the deliberate attempt of the appellant to part with the stolen goods by selling to handphones to SP9 and SP13;

(d) the appellant's attempt to dispose of the room keys by throwing them into a drain near the Caltex Petrol Station;

(e) the appellant's act of removing the Hotlink sim card (exh P9A) from the handphone and throw it at the parking area at the Sungai Petani Bus Station;

(f) the appellant's conduct of lying to SP9 and SP11 that he met an accident/fall from a motorcycle; and

(g) the stolen items were recovered from several places as a result of the appellant's subsequent conduct of leading PW16 to the discovery of those items.

[35] Intention or mens rea is not something capable of being established by direct evidence; it is a matter of inference. It could be gathered from all the facts and circumstances prevailing in the case (see *Sainal Abidin bin Mading v Public Prosecutor* [1994] 4 MLJ 497,; *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174), *Virsa Singh v State Punjab* AIR 1958 SC 465).

[36] In this regard, the appellant's intention may be gathered from the nature of the injuries and the weapon used. In the instant case, we found that the prosecution had established via the evidence by the pathologist ('SP17') that:

(a) the cause of death is 'complete transaction of the right internal carotid artery and partial transaction of the right internal jagular vein due to stab wound to the right retro-auricular region';

(b) the deceased was stab repeatedly;

(c) the chances of survival to a human who sustained this kind of injury are very slim; and

(d) a weapon like a knife could cause such injury.

[37] In view of the nature of the medical evidence given by SP17, and the used of dangerous weapon, we are of the considered view that the present case would fall squarely within s 300(c) of the Penal Code. In absence of anything else, the appellant who had inflicted these injuries must have intended to kill the deceased. We are in agreement with the learned trial judge that the appellant intended the death of the deceased. We have no reason to disturb His

A Lordship's finding.

ISSUE (B)

B **[38]** It was the appellant's contention that had the eight fingerprint impressions retrieved by SP15 were sent for analysis, there was a possibility of the presence of a third party, thereby causing a doubt in the prosecution's case.

C **[39]** With respect, we cannot accept the appellant's contention. As demonstrated at paras 33–36 of this judgment, the prosecution had clearly established that the appellant had committed the offence with the requisite mens rea. In the circumstances of this case, we are in total agreement with the learned deputy public prosecutor's argument that the lack of fingerprint evidence would assume little or no significance to the prosecution's case.

D

[40] Another issue to be addressed is the appellant's unreasonable behaviour. Based upon the appellant's narrative, he assisted the deceased upon seeing her being attacked by the unknown man. If he was genuine to assist the deceased, he could have immediately summon the authorities. Instead of calling the E police, he stole the deceased's handphones and the room keys. He also disposed of the items, and pocketed himself the deceased's money.

F **[41]** The appellant's conducts had greatly affected the probability of the appellant's version of the case. Further, he lied to SP9 and SP11. Those lies amounted to corroboration of the appellant's attempt to conceal guilt (see *Regina v Lucas (Ruth)* [1981] QB 720, *Syed Ali bin Syed Abdul Hamid & Anor v Public Prosecutor* [1982] 1 MLJ 132, *Kamrul Hasan Abdul Quddus v Public Prosecutor* [2011] SGCA 52).

G

ISSUE (C)

H **[42]** SP16 had given evidence that the appellant led the police to several places around Sungai Petani and Kuala Lumpur to recover several items. SP16 then reduced the events into a police report (exh P103).

I **[43]** Learned counsel submitted that learned trial judge had misdirected himself when he admitted the contents of exh P103 even though it was a clear violation of s 103 of the Criminal Procedure Code.

[44] With respect, the learned counsel's submission was misconceived. The learned trial judge had addressed his mind to the above issue and made the following finding:

> As regard the accused conduct leading SP16 to several places in Sungai Petani and Kuala Lumpur where several items were discovered were inadmissible under s 27 of the Evidence Act 1950. No information or oral statement was given by the accused which led to their discoveries. The contents of the police report, Sungai Petani Report No 7728, P103 was inadmissible confession allegedly made by the accused. The provision of s 113 of the Criminal Procedure Code has not been complied with. On this submission, I have no quarrel with the learned counsel and I am totally in agreement with him. However, the accused conduct which led to the discoveries of various exhibits is admissible under s 8 of the Evidence Act and such evidence could be used to corroborate the prosecution's case.

[45] In our judgment, the learned trial judge did not err when His Lordship admitted the evidence of conduct under s 8 of the Evidence Act 1950 (see *Prakash Chand v State* AIR 1979 400, *Bala anak Matik v Public Prosecutor* [2006] 3 MLJ 516; [2006] 2 CLJ 229).

[46] Before we conclude, there is one final matter that requires mention — motive. As we understand it, proof of motive does not established guilt and motive is not an essential ingredient for this offence (see *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] 2 CLJ 10). However, in cases of circumstantial evidence, motive is very important, unlike cases of direct evidence where it is not so important (see *Wakkar and Anor v State of Uttar Pradesh* [2011] 3 SCC 306 (para 18)).

[47] In the instant case, although no evidence of motive was presented, we rejected the appellant's contention that lack of motive supported his appeal. It may be that the prosecution was not able to prove the motive for the appellant to murder the deceased, but that could not possibly matter when the circumstantial evidence in this case was sufficient to prove, beyond reasonable doubt, that it was the appellant and no one else who intentionally cause the death of the deceased.

[48] Further, the failure of the prosecution to establish motive of the appellant to murder the deceased does not mean that the entire prosecution case has to be thrown overboard; it only cast a duty on this court to scrutinise each piece of evidence very closely in order to ensure that suspicion, emotion or conjecture do not take the place of proof (see *Nachhittar Singh v The State of Punjab* AIR 1975 SC 118 (SC)).

[49] In *Mulakh Raj etc v Satish Kumar and Others,* AIR 1992 SC 1175 (SC), the court had this to say:

> The case was based on circumstantial evidence and, therefore, motive being absent, the prosecution had failed to establish this important link in the chain of circumstances to connect the accused. We find no force in the contention.

A Undoubtedly, in cases of circumstantial evidences motive bears important significance. Motive always locks up in the mind of the accused and some time it is difficult to unlock. People do not act wholly without motive. The failure to discover the motive of an offence does not signify its non-existence. The failure to prove motive is not fatal as a matter of law. Proof of motive is never indispensable for conviction. When facts are clear it is immaterial that motive has not been proved. Therefore, absence of proof of motive does not break the link in the chain of circumstances connecting the accused with the crime, nor militates against the prosecution case.

C **[50]** We are satisfied that in this instant case, the clinching incriminating circumstances established by the prosecution would unerringly point to the guilt of the appellant alone. The appellant has no explanation to offer for such telling circumstances established against him. Therefore, in our view, the learned judge has rightly convicted the appellant under s 302 of the Penal Code.

[51] In the result, we dismissed the appeal and affirmed the conviction and sentence imposed by the learned trial judge.

E *Appeal dismissed.*

Reported by Kohila Nesan